County by emphasizing the passage of time since 1868, Opp. at 25-27, but a discriminatory taint persists until the link is affirmatively broken, even eighty years later. *See Hunter*, 471 U.S. at 233. The passage of time may allow a state more easily to establish a legitimate reason for a reenactment, but it does not eliminate this requirement.[11]

Respondents also seek to discredit this straightforward shift in the evidentiary burden by exaggerating what it requires. It is not that a discriminatory law "necessarily suffices to call into question the constitutionality of anything and everything that may have followed in its wake." Opp. at 27. It is not that a state must confess and repent the illicit intent of a prior provision. Opp. at 28. Rather, this Court has required that a state demonstrate that it had a legitimate reason for reenacting a tainted policy. This demand is hardly onerous, but Respondents have failed to meet it here.

B. The Lower Courts Are in Disarray.

Respondents fail to rationalize and harmonize the lower courts' decisions. Those courts have not recognized that the reenactment of a tainted policy is a distinct problem with a clear resolution. Without directly acknowledging the issue, the Fifth Circuit has asked whether the government articulated a valid reason upon reenacting a tainted policy. *See Chen v. City of Houston*, 206 F.3d 502, 520-21 (5th Cir. 2000).[12] The Eleventh Circuit does not. App. 20-25a. The

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[11] Thousands of older members of the Plaintiff class have directly experienced the continuity of Florida's policy: They were disenfranchised under the 1868 provision, and its reenactment in 1968 provided no new, valid reason for their continuing second-class citizenship.

[12] As Respondents note, *Chen* states that despite a once-tainted policy, an "intervening reenactment with meaningful alterations may render the current law valid." *Id.* at 521; Opp. at 22. If the reenacting body explains its legitimate reason for such a reenactment, as Houston did, there is no dispute that the policy may stand. *See Chen*, 206 F.3d at 520 (noting "that the City's plans were independently substantially justified by

Fourth Circuit has recognized the issue but declined to decide it. *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1355 (4th Cir. 1989). This Court should clarify the governing principle.

C. This Case Squarely Presents the Issue.

Respondents maintain that this case does not actually involve the reenactment of a tainted policy. They claim that, because criminal disenfranchisement in Florida predates African-American voting rights, the 1868 provision could not have been adopted with racist intent. Opp. at 29. Not so. Poll taxes predated the extension of the franchise, but were turned to illegitimate ends when the franchise was extended; so, too, with felony disenfranchisement laws.[13]

Second, Respondents claim that the 1868 felony disenfranchisement provision was meaningfully amended, rather than merely reenacted, in 1968. Again, not so. Florida's current felony voting ban (Fla. Const. art. VI, § 4 (App. 192a)) is the same as its 1868 ban (Fla. Const. of 1868, art. XIV, § 2 (App. 190a)), and is expressed in virtually identical language: citizens with felony convictions are barred from the polls for life, unless the executive chooses to restore their rights. Pet. at 9 n.5. The only change in 1968 was the omission of a separate and largely redundant provision (Fla. Const. of 1868, art. XIV, § 4 (App. 190a)) that directed the legislature to disenfranchise people based on certain enumerated and "infamous" crimes, including some

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traditional [race-neutral] districting factors"); *Hunter*, 471 U.S. at 228. But Florida has offered no reason for its 1968 reenactment.

[13] *See* J. Morgan Kousser, *Poll Tax, in International Encyclopedia of Elections* 208-09 (Richard Rose et al. eds., 2000) (noting the 18th-century history and later discriminatory use of the poll tax); *McLaughlin v. City of Canton*, 947 F. Supp. 954, 969-70, 976-78 (S.D. Miss. 1995) (reviewing the pre-Civil War history of criminal disenfranchisement in Mississippi, and evidence of its later discriminatory expansion); *cf. Irby*, 889 F.2d at 1354-56 (reviewing the race-neutral history of appointment of local school board officials and its later discriminatory application).

misdemeanors. The felony disenfranchisement provision, however, stands unchanged—in its intent, its terms, and its consequences.

Finally, Respondents claim—at least five times—that Petitioners conceded the absence of "any illegitimate purpose behind the 1968 provision." Opp. at 27; *see also id.* at 2, 19, 20, 28 n.15. Petitioners, however, did *not* concede that the 1968 provision was free of discriminatory intent. Petitioners acknowledged only that there is no evidence *in the R.H. Gray state archives* that race was considered in 1968. Pet. at 5.

This final quibble is a distraction, for it is premised on the wrong question. The real issue is whether, once Petitioners have shown a tainted history and continuous discriminatory impact, the State must prove that it had a legitimate reason to reenact its permanent felony disenfranchisement provision. This void cannot be filled by passing reference to the "penal laws," Opp. at 15 n.8, the existence of an "extensive deliberative process [of indeterminate content]" in the legislature, *id.* at 3, or the invocation of "an important [but unspecified] racially neutral public policy," *id.* at 16. Yet Respondents offer nothing more. This case turns on the allocation of the burden of proof; it therefore offers an excellent vehicle for this Court to clarify the issue.

CONCLUSION

For these reasons and those in the Petition, Petitioners respectfully request that this Court grant a writ of certiorari.

Dated: October 25, 2005

Respectfully submitted,

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In The

Supreme Court of the United States

Thomas Johnson, *et al.*,

Petitioners,

v.

Jeb Bush, Governor of Florida, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* LEAGUE OF WOMEN VOTERS OF FLORIDA IN SUPPORT OF PETITIONERS

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Cases

Atkins v. *Virginia*, 536 U.S. 304 (2002) 19
August v. *Electoral Comm'n* 1999 (3) SA 1 (CC) (S. Afr.) 18
Carrington v. *Rash*, 380 U.S. 89 (1965) 12
Cipriano v. *City of Houma*, 395 U.S. 701 (1969) 12
Coker v. *Georgia*, 433 U.S. 584 (1977) 14, 17
Davis v. *Beason*, 133 U.S. 333 (1890) 11, 13
Dunn v. *Blumstein*, 405 U.S. 330 (1972) 12
Ewing v. *California*, 538 U.S. 11 (2003) 14
Farrakhan v. *Washington*, 338 F.3d 1009 (CA9 2003), cert. denied, 125 S.Ct. 477 (2004) 8, 9
Florida Caucus of Black State Legislators, Inc. v. *Crosby*, 877 So. 2d 861 (Fla. Dist. Ct. App. 2004) 3
Georgia v. *Ashcroft*, 539 U.S. 461 (2003) 3
Green v. *Bd. of Elections*, 380 F.2d 445 (CA2 1967), cert. denied, 389 U.S. 1048 (1968) 11
Hendrix v. *Joseph*, 559 F.2d 1265 (CA5 1977) 10
Hirst v. *The United Kingdom*, Application No. 74025/01 (Eur. Ct. Hum. Rts. Oct. 6, 2005) 18
Johnson v. *Bush*, 405 F.3d 1214 (CA11 2005) 13
McMillian v. *Escambia County*, 559 F. Supp. 720 (N.D. Fla. 1983) 6
McLaughlin v. *City of Canton*, 947 F. Supp. 954 (S.D. Miss. 1995) 17
Muntaqim v. *Coombe*, 366 F.3d 102 (CA2 2004), cert. denied, 125 S.Ct. 480 (2004), rehearing en banc granted, 396 F.3d 95 (CA2 2004) 8, 9
Murphy v. *Ramsey*, 114 U.S. 15 (1885) 11, 13
Richardson v. *Ramirez*, 418 U.S. 24 (1974) 10
Romer v. *Evans*, 517 U.S. 620 (1996) 11

Sauve v. *Canada*, [2002] 3 S.C.R. 519 (Can.) 18
Shaw v. *Reno*, 509 U.S. 630 (1993) 6
Shepherd v. *Trevino*, 575 F.2d 1110 (CA5 1978) 11
Thornburg v. *Gingles*, 478 U.S. 30 (1986) 5
Trop v. *Dulles*, 356 U.S. 86 (1958) 13
United States v. *Marengo County*, 731 F.2d 1546 (CA11 1984) 10
Washington v. *State*, 75 Ala. 582 (Ala. 1884) 11
Wesley v. *Collins*, 791 F.2d 1255 (CA6 1986) 12

Statutes

42 U.S.C. 1973(a) 4, 9
42 U.S.C. 1973(b) 4, 9
42 U.S.C. 1973a(c) 6
42 U.S.C. 1973c 5
Fla. Stat. ch. 810.09(2)(e) (2002) 18
Fla. Stat. ch. 815.06 (2001) 18
Fla. Stat. ch. 832.05(2) (2004) 18

Other Authorities

Gordon Bazemore & Jeanne B. Stinchcomb, *Civic Engagement and Reintegration: Toward a Community-Focused Theory and Practice*, 36 Colum. Hum. Rts. L. Rev. 241 (2004) 15
Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 Am. J. Soc. 559 (2003) 12
David A. Bositis, *Black Elected Officials: A Statistical Summary 2001*, Joint Ctr. for Political & Econ. Studies (2003), *available at* http://www.jointcenter.org/publications1/publication-PDFs/BEO-pdfs/2001-BEO.pdf 8

Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697 (2002) 16

Roger Clegg, *Who Should Vote?*, 6 Tex. Rev. L. & Pol. 159 (2001) 13

Matthew A. Crenson & Benjamin Ginsberg, Downsizing Democracy: How America Sidelined Its Citizens and Privatized Its Public (2002) 16

Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 Minn. L. Rev. 753 (2000) 14

Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (1998), *available at* http://www.hrw.org/reports98/vote/ 8, 11

Florida Rights Restoration Coalition, Florida Rights Restoration Coalition Action Plan (Draft) (2005) 2

Florida Rights Restoration Coalition, Florida Rights Restoration Coalition Activities (2005) 2

Stephen Holmes & Cass R. Sunstein, The Cost of Rights: Why Liberty Depends on Taxes (1999) 12

Journal of Debates and Proceedings in the Convention of Delegates Chosen to Revise the Constitution of Massachusetts (Da Capo 1970) (1853) 16

Alexander Keyssar, The Right To Vote (2000) 7

John Laub et al., *Trajectories of Change in Criminal Offending: Good Marriages and the Desistance Process*, 63 Am. Soc. Rev. 225 (1998) 15

League of Women Voters, *About the League*, *at* http://www.lwv.org/AM/Template.cfm?Section=About_Us 1

John Locke, The Second Treatise of Government (J.W. Gough rev. ed. 1976) (3d ed. 1698) 13

Man Held in Theft of Wireless Web Access, Miami Herald, July 8, 2005, at B6 18

Miami Chronology: 1920-1940, Miami Herald, Sept. 13, 2002, *available at* http://www.miami.com/mld/miamiherald/news/photos/4069508.htm 7

Aman McLeod et al., *The Locked Ballot Box*, 11 Va. J. Soc. Pol'y & L. 66 (2003) 20

Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"*, 102 Harv. L. Rev. 1300 (1989)..... 14

Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry (2003)..... 17

Frank Phillips, *Lawmakers Push to Ban Inmate Votes*, Boston Globe, June 28, 2000, at B1 13

Gary L. Reback, Note, *Disenfranchisement of Ex-felons: A Reassessment*, 25 Stan. L. Rev. 845 (1973) 14

Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 Stan. L. Rev. 1271 (2004)..... 20

Robert Sampson & John Laub, *Crime and Deviance over the Life Course: The Salience of Adult Social Bonds*, 55 Am. Soc. Rev. 609 (1990) 15

The Sentencing Project, *Felony Disenfranchisement Laws in The United States* (2005), *available at* http://www.sentencingproject.org/pdfs/1046.pdf..... 10

Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 Colum. Hum. Rts. L. Rev. 193 (2004)..... 15

Christopher Uggen et al., *"Less Than the Average Citizen": Stigma, Role Transition and the Civic Reintegration of Convicted Felons*, *in* After Crime and Punishment: Ex-Offender Reintegration and

Desistance from Crime (Shadd Maruna & Russ Immarigeon eds. 2002) 15

U.S. Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1970* (1975) 8

U.S. Bureau of the Census, Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2004 (May 25, 2005), available at http://www.census.gov/population/www/socdemo/voting/cps2004.html 6

U.S. Commission on Civil Rights, Voting Irregularities in Florida During the 2000 Presidential Election (June 2001), available at http://www.usccr.gov/pubs/vote2000/report/main.htm 7, 19, 20

H.R. Rep. 91-397 (1969) 5

S. Rep. No. 94-295 (1975) 5

S. Rep. No. 97-417 (1982) 4, 5, 6, 10

STATEMENT OF INTEREST

The League of Women Voters is a nonpartisan political organization that encourages political responsibility through informed and active participation of citizens in government. See League of Women Voters, *About the League*, http://www.lwv.org/AM/Template.cfm?Section=About_Us (last visited Oct. 11, 2005). Founded in 1920 at the National American Woman Suffrage Association convention, the League of Women Voters is premised on the conviction that no American citizen should be restricted from voting merely because of his or her status. Today, in addition to the national organization in Washington, D.C., fifty state Leagues, and nearly nine hundred local Leagues work to empower American citizens and to "encourage people to vote." *Ibid.*

Amicus, the League of Women Voters of Florida ("LWVF"), is the national League's Florida affiliate, established in 1939, and currently comprised of 3,200 members. The LWVF has long taken the position that Florida's policy of lifetime disenfranchisement for persons convicted of a felony is inconsistent with the League's commitment to universal citizen enfranchisement. LWVF has filed this brief *amicus curiae* in support of the petition for certiorari as part of its ongoing effort to change Florida's policy and to restore voting rights to the 613,000 Florida citizens who have completed their felony sentences now barred from full civic participation.[1]

LWVF is a charter member of the Florida Rights Restoration Coalition ("FRRC"), an umbrella group of voting- and civil-rights organizations founded in March 2003

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *amicus* states that none of the parties or their counsel wrote the brief in whole or in part and that no one other than *amicus*, its members, and counsel made any monetary contribution to the preparation or submission of the brief.

with the goal of planning and implementing "grassroots legislative initiat[ives] geared toward the restoration of rights to former felons." FRRC, Florida Rights Restoration Coalition Activities (2005). FRRC is comprised of over forty non-partisan statewide organizations, including the Florida Council of Churches, the Florida Voters League, the Miami-Dade Election Reform Coalition, and the YWCA of Greater Miami.

LWVF, in concert with FRRC, has developed a number of programs with the ultimate goal of restoring voting rights to Florida citizens who have paid their debts to society and have fully completed their sentences. First, FRRC has been seeking legislative change. FRRC members arrange meetings with state legislators at which persons "directly and/or indirectly affected by Florida's voting and civil rights ban" – such as a formerly convicted citizen, a family member of an ex-felon, or a social service provider – can explain the harmful impact of Florida's current laws and procedures. See FRRC, FRRC Action Plan (Draft) (2005). In addition, FRRC provides information to legislators "as to why restoration of voting and civil rights should be automatic after completion of the sentence." *Ibid.*

Second, LWVF members have been working to ameliorate the effects of Florida's disenfranchisement law by helping ex-felons to navigate the state's existing restoration policy. To restore their rights, Florida citizens with past felony convictions must complete a "Restoration of Civil Rights" ("RCR") application and then hope that the Governor and the Executive Clemency Board use their unlimited discretion to grant restoration. The LWVF believes the restoration process lacks accountability and oversight; the Governor and Clemency Board do not even have to provide the applicant with a reason for denial. Not only is the process complicated and often fruitless, but it is also inaccessible to many former offenders. Although state law requires the Department of Corrections to assist incarcerated offenders with the RCR application prior to their release, the

Department of Corrections often fails to inform inmates of the clemency process. Only recently, in response to a lawsuit brought by the Florida Caucus of Black Legislators, did the courts restore voting rights to several thousand people who had not been informed of their rights in the clemency process. See *Florida Caucus of Black State Legislators, Inc.* v. *Crosby*, 877 So. 2d 861 (Fla. Dist. Ct. App. 2004).

Recognizing that many ex-felons are still unaware of their rights in the clemency process, FRRC hosted ten step-by-step workshops across Florida in July 2003 to assist citizens with past felony convictions in applying for restoration. Overall, 210 volunteers from local FRRC organizations, including LWVF, assisted over 660 people with completing applications.[2] FRRC then forwarded the applications to the Office of Executive Clemency in Tallahassee, with the hope that these Florida citizens would finally have an opportunity to once again achieve full citizen status. Nonetheless, LWVF recognizes that the workshops are too limited a device for full restoration and that the RCR process is arbitrary, uncertain, and inaccessible at best. For these reasons, LWVF believes that until Florida's law provides for automatic restoration of voting rights for former offenders, thousands of black Florida citizens will continue to be denied one of their most fundamental rights.

SUMMARY OF ARGUMENT

Congress enacted the Voting Rights Act ("VRA") in 1965 to bring disenfranchised African-American voters into the political process. As this Court recently recognized, the "purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Georgia* v. *Ashcroft*, 539 U.S. 461, 490 (2003). Florida's lifetime felon disenfranchisement law stands as a

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[2] Even this significant number represents only one-tenth of one percent of the plaintiff class.

direct obstacle to that congressionally mandated transformation by continuing to disenfranchise large numbers of African-American voters.

This Court should grant certiorari to make clear that plaintiffs can challenge felon-disenfranchisement provisions, under section 2 of the VRA, just as they can challenge any other "voting qualification" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. 1973(a). Florida's lifetime disenfranchisement of persons convicted of a felony is precisely such a qualification. The law's disparate impact is undeniable: although African Americans constitute only 13.6% of the state's voting-age citizens, 27.3% of the more than 613,000 ex-felons who are disenfranchised after completing their sentences are black; approximately 10.5% of the state's adult black population is disenfranchised, compared with 4.4% of the non-black population.

Section 2 directs courts to consider "the totality of circumstances" in reviewing a challenged "voting qualification." 42 U.S.C. 1973(b). Congress identified one of those circumstances as whether "the policy underlying the * * * voting qualification" is "tenuous." S. Rep. No. 97-417, at 29 (1982).

Under controlling constitutional doctrine, the traditional justifications for lifetime felon disenfranchisement laws are not merely "tenuous": they are constitutionally impermissible. States are no longer permitted to deny someone the right to vote based on assumptions that he or she will vote in ways that a majority considers "anti-social" or "subversive" of the existing order. Nor can a state justify stripping an individual permanently of the right to vote by claiming that it is a valid or proportional form of punishment.

Not only are the proffered justifications for lifetime felon disenfranchisement tenuous at best, but such practices actually undermine important goals of the criminal justice and political processes. Empirical evidence suggests that lifetime

felon disenfranchisement laws increase recidivism rates among ex-felons and suppress voting rates among law-abiding citizens in communities where large numbers of ex-felons reside. Conversely, restoration of voting rights reduces recidivism and encourages citizens in historically underrepresented communities to exercise their civic duty through the ballot box.

ARGUMENT

I. FLORIDA'S PROVISION DIRECTLY IMPEDES THE CENTRAL GOAL OF THE VOTING RIGHTS ACT: FULL PARTICIPATION OF MINORITY CITIZENS IN THE POLITICAL PROCESS.

1. A central purpose of the Voting Rights Act of 1965 was to eliminate the legal barriers that have prevented African Americans from participating fully and equally in the political process. The Congresses that enacted and amended the Voting Rights Act were particularly concerned with restrictive registration practices, ranging from literacy tests and poll taxes to so-called "good character" requirements and voter purges. S. Rep. No. 97-417, at 5 (1982) (hereafter "Senate Report");[3] S. Rep. No. 94-295, at 12 (1975); H.R. Rep. 91-397, 1970 U.S.C.C.A.N. 3277, at 3281 (1969).

Congress expressed that concern not only by enacting and amending section 2 – the provision directly at issue in this case – but also by creating a system of extraordinary remedies for jurisdictions with a particularly pervasive history of discriminatory disenfranchisement. The "preclearance" regime of section 5 of the Act, 42 U.S.C. 1973c, requires covered jurisdictions to seek federal approval of any change in their voting laws because Congress feared that any gains in

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[3] The 1982 Senate Report constitutes the "authoritative source for legislative intent" behind the amended Voting Rights Act. *Thornburg* v. *Gingles*, 478 U.S. 30, 43 n.7 (1986).